

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

RE: Vermont Air National Guard Findings of Fact,
South Burlington, VT 05401 Conclusions of Law
and Order
Declaratory Ruling #134

On April 8, 1982, the City of Winooski petitioned the Environmental Board (the "Board") for a declaratory ruling, following an Advisory Opinion issued by the Executive Officer of the Board on March 11, 1982. The petition concerns certain proposed improvements by the Vermont Air National Guard (the "Air Guard") at its South Burlington air base located at the Burlington International Airport, South Burlington, Vermont. Petitioner requests that the Board find that the Air Guard's proposed construction of improvements is for a state purpose involving more than ten acres of land and, therefore, requires a land use permit under 10 V.S.A., Chapter 151.

A pre-hearing conference was held on May 11, 1982, in Montpelier, Vermont, Chairman Leonard U. Wilson presiding. The Board convened a public hearing on the petition on May 26, 1982, in Winooski, Vermont. Parties present at the hearing were the following:

Petitioner, City of Winooski by William E. Wargo, Esq.
Vermont Air National Guard by Thomas O'Donovan, Deputy
Adjutant General and J. Eric Anderson, Esq.,
Staff Judge Advocate;
Chittenden County Regional Planning Commission by
Arthur R. Hogan, Jr., Executive Director; and
Agency of Environmental Conservation by Dana Cole-
Levesque, Esq., Land Use Administrator.

The hearing was recessed on May 26, 1982. On June 10, 1982, the Air Guard filed requested Findings of Fact. On June 11, 1982, the City of Winooski filed requested Findings of Fact. On June 16, 1982, the Board was notified by the Air Guard that additional information would be forwarded by the Department of the Air Force. This information was subsequently received on June 25, 1982. On June 17, 1982 the City of Winooski filed a response to this communication. On July 7, 1982, the Board reviewed the record, determined it to be complete, and adjourned the hearing. The matter is now ready for decision. The Board makes its following Findings of Fact and Conclusions of Law based on the record developed at the hearing. To the extent that the Board agreed with and found necessary, the requests for findings filed by the parties have been incorporated herein.

I. ISSUE RAISED BY THE DECLARATORY RULING

The declaratory ruling raises the following issue:

Whether the Air Guard's proposed construction of improvements at its South Burlington air base is a project for state or municipal purposes, on a tract or tracts of land involving more than ten acres, thereby requiring a Land Use Permit pursuant to 10 V.S.A., Chapter 151 (Act 250).

Petitioner argues that the project is for a state purpose, involves more than ten acres of land to be used by the state and for members of the general public, and therefore requires a land use permit under 10 V.S.A. §6081 and Board Rules 2(A)(4), 2(E), and 2(F).

The Air Guard argues that the construction of improvements is for a federal purpose, built with federal funds on federally-leased and controlled land.

II. FINDINGS OF FACT

1. The Air Guard has replaced its EB-57 aircraft with F-4 aircraft. This aircraft conversion requires the construction of improvements at the Air Guard's air base. The proposed improvements are the following:
 - (a) aircraft arresting barrier;
 - (b) single point hydrant refueling system;
 - (c) fuel systems maintenance hangar;
 - (d) relocation of liquid oxygen storage facilities;
 - (e) nondestructive inspection laboratory;
 - (f) hush house; and
 - (g) related minor improvements.
2. The Air Guard's air base is located at the Burlington International Airport in South Burlington, Vermont, on approximately 278 acres of land. The land is owned by the City of Burlington and leased to the United States of America.
3. The lease between the federal government and the City of Burlington is dated June 17, 1974, and runs for a succession of one-year terms terminating on June 30, 2023. By the terms of the lease, the premises are leased "for the exclusive use of the Government and/or the State of Vermont Air National Guard" (Exhibit #2).

4. The proposed improvements will be constructed on more than ten acres of leased land, and is mandated by and will be funded by the federal government. According to Paragraph 8 of the lease, all improvements of any nature constructed by the federal government are the property of the federal government (Exhibit #2).
5. The F-4 Aircraft and its appurtenant equipment will be used solely to carry out the national defense mission of the Air Guard.

III. CONCLUSIONS OF LAW

1. Petitioner requests that the Board find Act 250 jurisdiction because the purpose of the construction is "at least partially state." We cannot so find. We conclude that the purpose is a federal purpose based on the following factors: the improvements are to be (1) constructed, (2) funded, (3) owned by the federal government, and (4) are located on more than ten acres of land controlled by the federal government.
2. Petitioner argues that Green Mountain Power Corp. and U.S. Department of Energy, D.R. #120 (November 14, 1980) is distinguishable and should not control here. In that case we held that Act 250 jurisdiction does not apply to a federal project under federal control in a national forest. Petitioner bases his distinctions on: (1) the fact that the federal government leases but does not own the land at the air base, and (2) that there is at least a partial state purpose in the construction. 10 V.S.A. §6001(3) and Board Rule 2(F) do not require that the involved land be "owned" by the party proposing the construction. It is sufficient for purposes of jurisdiction that the party control the land. We conclude from the terms of the lease that the land in question is controlled by the federal government.
3. The Board acknowledges that the Air Guard is a state organization that both "serves the state in time of civil emergencies within the state" and is "available for federal service during national emergencies." Mela v Callaway, 378 F. Supp. 25 (S.D.N.Y. 1974). However, the issue here is whether the proposed improvements are being made for a "state purpose." In this case,

the combination of a solely federal purpose and federal control leads us to conclude that the proposed improvements are not for state purposes within the meaning of 10 V.S.A. §6001(3). A change in control or purpose, or a combination of the two, however, might very well trigger Act 250 review under 10 V.S.A. §6001(3).

ORDER

The proposed improvements do not require a land use permit pursuant to 10 V.S.A., Chapter 151.

Dated at Montpelier, Vermont this 20th day of July, 1982.

ENVIRONMENTAL BOARD

By Jan S. Eastman
Jan S. Eastman
Executive Officer

Board members participating
in this decision:
Leonard U. Wilson
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. Burnham, Sr.
Melvin H. Carter
Warren M. Cone
Donald B. Sargent
Priscilla N. Smith